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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Carriage of the Transmissions
of Digital Television Broadcast
Stations)

Amendments to Part 76
of the Commission's Rules)

CS Docket No. 98-120

COMMENTS OF GTE

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SUMMARY

GTE believes that the instant proceeding is premature until the Commission engages in a substantial dialogue with the industry to understand the ramifications of any digital must carry proposal. More specifically, GTE supports Option 7 and opposes the imposition of a digital must carry requirement upon cable operators during the transition period.

GTE respectfully submits, in accordance with standard rules of statutory construction, as well as to avoid constitutional questions, the Commission lacks authority to impose new must carry requirements upon cable operators other than a requirement that when a broadcaster turns in its analog channel, the broadcaster's must carry rights will migrate to its digital signal only. Any broader interpretation of the statute impermissibly would impinge upon GTE's First Amendment rights under established case law, as the requisite justification for such governmental action has not been and cannot be developed with respect to dual analog and digital must carry.

GTE also respectfully submits that current retransmission consent rights do not allow broadcasters to require cable operators to carry digital signals as a pre-condition of carriage of analog signals. The Commission should take steps to ensure this does not happen in the October 1999 election.

GTE understands the Commission's interest in soliciting the cooperation of cable operators, so that the transition to digital television and the return and subsequent auction of analog spectrum is not delayed beyond the current target date of 2006. However, GTE submits that the Commission's goal would be harmed rather than

helped by the imposition of mandatory dual carriage, and that the Commission should not supplant the natural marketplace forces and technological developments with a new set of complex federal regulations.

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COMMENTS OF GTE

GTE Service Corporation and GTE Media Ventures Incorporated (GTE),^{1/} respectfully submit their comments in response to the Commission's *Notice of Proposed Rulemaking (NPRM)*. In these Comments, GTE supports Option 7 and opposes the imposition of a digital must carry requirement upon cable operators during the transition period between analog to digital broadcasting.

^{1/} GTE Media Ventures Incorporated (GTEMV) is a first tier subsidiary of GTE Corporation established to provide video programming and other entertainment services to the public. GTEMV is a franchised cable operator in California and Florida, provides wireless cable (MMDS) service in Hawaii, private cable (SMATV) service to selected multiple dwelling units (MDUs) and direct-to-home (DTH) satellite-based service (pursuant to an agreements with DirecTVTM and USSB) in selected markets.

I. SUMMARY OF THE NOTICE OF PROPOSED RULEMAKING.

In the *NPRM*^{2/}, the Commission seeks comment on proposals to require cable operators, as part of their "must carry" obligations, to carry both the analog and digital signals of television broadcast stations during the transition period from analog to digital broadcasting. As the Commission recognizes, the impending conversion from analog to digital signals by television broadcast stations presents a unique situation in the application of the Congressionally-mandated must carry rules.^{3/} In the period between the commencement of digital service^{4/} and December 31, 2006 (at which time they currently are required to return their analog 6 MHz channel to the Commission),^{5/} broadcasters simultaneously may broadcast both analog and digital signals, thus substantially increasing the overall number of channels to be broadcast over the airwaves. Were cable operators required to carry both the analog and digital signals of broadcasters, the Commission fundamentally would alter the content of cablecasting and seriously impact multichannel video programming distributors ("MVPD's"), video

^{2/} In the matter of *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, *Notice of Proposed Rulemaking*, FCC 98-153 (rel. July 10, 1998).

^{3/} 47 U.S.C. §§534, 535; 47 C.F.R. §76.56.

^{4/} At least 41 stations intend to begin digital broadcasts in November, according to the Chairman's recent Statement on Digital Television Transition. See *FCC News*, (rel. October 6, 1998).

^{5/} Broadcasters may retain both channels and continue analog broadcasting beyond 2006 in the event that penetration of digital receivers and/or converters takes longer than projected, raising the specter that the Commission's actions herein may have an impact beyond 2006. See 47 U.S.C. §309(j)(14)(B).

programming vendors ("VPV's"), regulators and consumers. A government-mandated alteration of cablecasting content of this magnitude is unprecedented, even by the standards of current analog must carry regulations.

In considering the appropriate must carry regime for the analog-to-digital transition period, the Commission proposes seven possible options, six of which require cable systems to carry at least some digital broadcast signals during the transition period.^{6/} The Commission's Option 7 proposes adoption of no digital carriage requirements during the transition period.^{7/} GTE respectfully submits that Option 7 is the only option consistent with the Communications Act, as any broader interpretation of the Act impermissibly would infringe on GTE's First Amendment rights.^{8/}

The *NPRM* also seeks comment on the issues surrounding interoperability between the digital formats chosen by broadcasters to transmit digital signals to over-the-air receivers and by cable operators to retransmit their digital signals to subscribers.^{9/} The Commission recognizes that the complex problems related to cable

^{6/} *NPRM* at ¶¶39-51. The *NPRM* forthrightly recognizes that "[t]o the extent that the Commission imposes a digital must carry requirement, cable operators could be required to carry double the amount of television stations, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited." *Id* at ¶ 39

^{7/} *Id* at ¶50.

^{8/} The Commission recognizes (as it must) that the first six digital must carry proposals raise grave constitutional and statutory concerns which must be addressed prior to implementing any rules. *Id* at ¶¶15-16.

^{9/} *Id* at ¶22. Broadcasters plan to transmit digital signals using either 8 or 16 vestigial sideband modulation (VSB). The cable industry however, chose to use either 64 or 256

set-top boxes' ability to pass through HDTV and DTV signals, to decompress (or compress if necessary) multiplex signals, and to otherwise process such signals would have to be resolved before any digital must carry obligations could be imposed.^{10/} The Commission also recognizes that many of its other rules are either inconsistent with a digital must carry requirement, such as the non-duplication rule and the primary signal rule^{11/}, or cannot be applied to digital must carry without substantial clarification or revision, such as channel capacity, station eligibility for must carry, material degradation, tier and channel position, and the effect digital must carry would have on small cable systems.^{12/} Given the complexity of these issues, GTE believes that mandated carriage of digital signals is premature at this time.

II. IT IS PREMATURE FOR THE COMMISSION TO ADOPT DIGITAL MUST CARRY REQUIREMENTS.

GTE believes that the transition period should be used to allow market based solutions to the complex issues raised in the *NPRM*. Rather than seeking to write rules in an adversarial notice and comment proceeding, the Commission should establish a substantial and open dialogue with broadcasters, cable operators, engineers and consumers in order to understand and observe the evolving marketplace with respect to

quadrature amplitude modulation (QAM) which allows for greater operating efficiency, higher data rate and requires less error correction.

^{10/} *Id* at ¶¶25-31.

^{11/} *Id* at ¶¶69, 71.

^{12/} *Id* at ¶¶55, 58, 62, 75, 78.

digital technology. The imposition of digital must carry rules would be antithetical to the video programming and distribution markets until all participants may better understand when and what type of equipment will be available, how much it will cost, and what percentage of consumers have any interest in buying digital receivers. Only then could the Commission have the statistical data and economic information to consider whether digital must carry rules are necessary and appropriate, and could be crafted in a manner that is constitutionally and statutorily permissible.

The Commission's first priority in this matter should be to afford parties time to negotiate with each other for voluntary carriage, which would allow for an accurate gauge of consumer demand for digital programming. The Commission should take steps to ensure that these negotiations are conducted without undue advantage being conferred by the retransmission consent rules.^{13/} Apart from monitoring the upcoming retransmission consent elections, the Commission's only other role at this time should be to foster interoperability standards and perhaps encourage funding for advanced systems research.^{14/}

^{13/} GTE believes that the Commission needs to pay close attention to the upcoming must carry election. Broadcasters may try to use retransmission consent to force cable operators to carry their DTV channels for the right to carry their analog channels, giving broadcasters unprecedented leverage. The Commission hints at this issue in the *NPRM*, however because of the possible abuse of the retransmission consent policy, the matter needs to be fully explored in the record and Commission action taken in this proceeding. See *Id* at ¶32.

^{14/} From a technical standpoint, the Commission should concentrate on facilitating the adoption of an industry compatible interface. Without a compatible interface, it is meaningless for the Commission to adopt an implementation schedule or any must carry requirements.

An attempt to implement digital must carry regulations prematurely could inhibit, rather than promote, the early adoption of digital technology and the return of the analog spectrum. For example, if cable subscribers believe they do not need to purchase digital receivers or supplemental converters because cable operators will be required by the Commission to decode digital signals for reception on existing analog television sets, the market for digital television sets and off-air converters may be drastically reduced and economies of scale may not be achieved, resulting in slower adoption of digital technology and significant delay in return of the analog spectrum. The complexity of these issues indicates a dialog with industry is more appropriate at this time than an attempt to mandate cable carriage.

III. THE COMMISSION PRESENTLY LACKS STATUTORY AUTHORITY TO IMPOSE DUAL DIGITAL AND ANALOG MUST CARRY REQUIREMENTS.

GTE does not object to a requirement that at such time as a broadcaster completes the transition to digital and turns in its analog channel for auction, then must carry rights would migrate to the digital channel.^{15/} The Commission, however, suggests it may have been charged by Congress with doing more to ensure completion of the return of analog spectrum by 2006, although the Commission recognizes several fundamental ambiguities and uncertainties with such an interpretation.

^{15/} This of course assumes that all interoperability concerns have been resolved by this time.

The Commission candidly admits that, "There are no federal digital cable transition requirements."^{16/} The Commission also admits that current law exempts cable operators from must carry of dual signals,^{17/} and obligates them to carry only the primary video signal of television stations.^{18/} Nevertheless, the Commission proposes to enlist cable operators in a costly campaign to ensure the success of digital broadcasting based upon two statutory provisions of the Act, a section of the Commission's must carry rules pertaining to signal quality^{19/} and provisions of Title III of the Act concerning broadcast licenses.^{20/} Neither of these sections directly authorize or appear even to contemplate creation of the must carry rule revisions proposed in the *NPRM*.

GTE's position is based upon the well-settled proposition that a statutory interpretation that would lead to a constitutional doubt should be avoided.^{21/} The statutory language that gives rise to this proceeding is fully consistent with GTE's

^{16/} *NPRM* at ¶¶8, 69-70.

^{17/} *Id* at ¶7; 47 U.S.C. §534(b)(5).

^{18/} *NPRM* at ¶¶69-71; 47 U.S.C. §§534(b)(3)(A).

^{19/} *NPRM* at ¶¶7, 31; 47 U.S.C. §534(b)(4)(B).

^{20/} 47 U.S.C. §309(j)(14)(B) and 336(b)(3).

^{21/} *E.g.*, *Almendrez-Torres v. U.S.*, 118 S. Ct. 1219, 1227-28 (1998)(Discussing the doctrine of "constitutional doubt" generally, although not with respect to the Communications Act); *Cable Holdings of Georgia v. McNeil Real Estate*, 953 F.2d 600, 604 (11th Cir. 1992)(Rejecting an interpretation of the Communications Act provision on cable television access to dedicated utility easements that would raise a taking issue in favor of a more restrictive interpretation that does not raise that issue).

position, while the Commission's more expansive reading would raise constitutional difficulties. Also, the statute must be read as a whole. The Commission's focus upon the must carry provision on "signal quality" would read out of the statute the companion provisions on "duplication not required" and carriage of "the primary video".

A. The Narrow Provision of the Must Carry Statute on "Signal Quality" Does Not Support Required Carriage of Both Analog and Digital Signals.

The Commission relies upon a narrow provision of the must carry statute dealing with "signal quality" to attempt to support a requirement that cable operators carry both digital and analog signals during the transition period:

(4) Signal quality

...(B) Advanced Television.- At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.^{22/}

GTE's position is sufficient to satisfy the statute. Carriage of digital signals after a broadcaster converts to digital and turns in its analog channel satisfies the requirement for carriage of "local commercial television stations *which have been changed* to conform with [the new standards for digital television]."^{23/}

^{22/} 47 U.S.C. §534(b)(4)(B). Section added by P.L. 102-385, The Cable Television Consumer Protection and Competition Act of 1992, 106 Stat 1460 §4 (approved October 5, 1992).

^{23/} *Id.* (emphasis added).

A broader interpretation is not called for, as the statute does not refer to a transition period or the need for dual carriage of analog and digital signals. To the contrary, the statute specifically and unambiguously refers to a change from one format to the other. A plain reading of the statute is that Congress intended a broadcaster's must carry rights to migrate to its digital channel only when the broadcaster itself migrates to that digital channel and at the time it returns its analog channel for auction.

Significantly, the provision is contained under a subsection of the must carry rules entitled, "Signal quality", the most reasonable interpretation being that it deals with the technical standards for cable carriage of broadcast signals after the broadcaster has converted to digital. Had Congress intended any of the actions proposed in Options 1-6 of the *NPRM*, presumably Congress would have created a provision to the effect of, "Carriage of both analog and digital signals during digital transition period". That no such provision exists indicates Congress did not intend or confer upon the Commission authority to undertake such action. For the Commission to rely upon one minor section of the must carry statute under the heading of "Signal quality" and expand its meaning to construct a new, complex regime of must carry rights for a multiplicity of dual signals over an eight year period appears unsupported by the context and language of the provision.

Moreover, the statute must be read as a whole,^{24/} giving effect to all of its provisions.^{25/} The provision on “signal quality” immediately is followed by a provision entitled, “Duplication not required” that exempts cable operators from carriage of duplicative local television signals.^{26/} Also, the provision on “signal quality” immediately is preceded by a provision entitled, “Content to be carried” which states that cable operators are required to carry only the “primary video” of local broadcast stations.^{27/} Reading the statute as a whole, including the non-duplication and primary video provisions, the only permissible reading of the “signal quality” provision is that it applies to local broadcast station digital transmissions only after the stations have returned their analog spectrum, since only then would the digital signal not be “duplicative” (given the progressive simulcast requirement) and be the “primary video” signal.

The legislative history also fails to support the Commission’s broad interpretation. Section 614(b)(4)(B) of the Act only briefly is discussed at three points in House and Senate Reports:

Subsection (b)(4)(B) provides that, when the Commission adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes

^{24/} *E.g., National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 417 (1992)(The Commission “must look to the structure and language of the statute as a whole”).

^{25/} *E.g., Pennsylvania Dep’t of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

^{26/} Section 614(b)(5), 47 U.S.C. §534(b)(5).

^{27/} Section 614(b)(3)(A); 47 U.S.C. §534(b)(3)(A).

in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section.^{28/}

The issue of "advanced television" is addressed in subsection (b)(4)(B). The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.^{29/}

Subsection (b)(4)(B) provides that, when the Commission adopts new standards for broadcast television signals, such as the authorization of broadcast HDTV, it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this new section 614.^{30/}

Like the statute itself, the reports focus upon broadcast signals that "have been changed" to conform to the new "technical standards" for digital broadcasting. Notably absent from the Reports is any statement simultaneously requiring cable operators to carry local broadcasters' analog and digital channels for as many as eight years from 1998 to 2006 - and possibly longer if broadcasters obtain extensions past 2006. It appears clear to GTE that the simplest and most logical interpretation of Congressional intent is that Congress wants to ensure that when television stations convert to digital,

^{28/} H.R. Rep. No. 862, 102d Cong., 2d Sess. 67 (1992).

^{29/} H.R. Rep. No. 628, 102d Cong., 2d Sess. 94 (1992).

^{30/} S. Rep. 92, 102d Cong., 1st Sess. 85 (1991).

cable operators will carry the broadcast signals in the new digital format, and not in some fashion convert the signal and carry it in the old analog format.

B. Title III Provisions on Broadcast Licenses Provide No Support for Amendment of the Must Carry Rules.

Apart from the must carry rules governing "signal quality", the only other statutory authority recited by the Commission consists of provisions of Title III dealing with broadcast licenses. *NPRM* paras 8 and 12. Specifically, Section 309 deals with the "Form and Conditions Attached to Licenses" and subsection 309(j) governs the return of analog channels at the end of the transition period. Section 336 deals with "Broadcast Spectrum Flexibility" and subsection 336(b)(3) deals with ancillary services - not including the broadcast signals that are the subject of the *NPRM*. Had Congress intended to impose an additional must carry regime upon cable operators, it would have placed such provisions in Title VI, Cable Communications, and specifically in Section 614 of the Act,^{31/} i.e. the must carry provisions. GTE believes it is a substantial reach for the Commission to rely upon provisions of Title III dealing with broadcast licenses to justify a major revision of the must carry rules, which have been the subject of close Constitutional and statutory review.

The Commission appears to rely heavily upon Section 309(j)(14)(B) to support the proposition that, "return of the analog spectrum is in part dependent on carriage of digital television stations by cable operators."^{32/} The *Balanced Budget Act of 1997*

^{31/} 47 U.S.C. §534.

^{32/} *NPRM* at ¶10.

("BBA")^{33/} authorized the Commission to extend the date for broadcast stations in any market to return analog channel if one of the two following conditions are met: (i) at least one local commercial station affiliated with a major network is not broadcasting in digital and that station has satisfied the Commission's construction extension criteria; (ii) digital-to-analog converter technology is not generally available in the market; or (iii) in those markets where an extension is not available under the first two subsections, 15% or more of the television households in the market do not subscribe to a cable system or other MVPD carrying one of the digital channels of each station broadcasting in digital and they do not have either a digital receiver or converter.^{34/} The provisions, on their face, reflect factors primarily unrelated to cable carriage of digital broadcast signals, as subsection (iii) applies only where an extension is not otherwise available.

The context, language and history of Section 309(j) fail to support an expansion of the must carry rules. Section 309(j) contains no mention of a simultaneous cable carriage requirement for analog and digital signals for every local broadcast station. On the contrary, it refers to carriage of, "one of the digital television programming channels of each of the television stations broadcasting such a channel in such market."^{35/} Had Congress expected cable systems to be carrying both the analog and digital signal of the same broadcast station, Congress would have addressed that situation within what

^{33/} *Balanced Budget Act of 1997*, Pub. L. No. 105-33, 111 Stat. 251 (1997).

^{34/} 47 U.S.C. §309(j)(14)(B).

^{35/} 47 U.S.C. §309(j)(14)(B)(iii)(I).

is otherwise an extremely detailed provision. The absence of any mention of such a situation demonstrates Congress had no such expectations.^{36/}

The legislative history of the *BBA* specifically states that it is not intended to alter the must carry rules:

...Congress is not attempting to define the scope of any MVPD's "must carry" obligations for digital television signals. The conferees recognize that the Commission has not yet addressed the "must carry" obligations with respect to digital television service signals, and the conferees are leaving that decision for the Commission to make at some point in the future.^{37/}

These cited statements are entirely consistent with GTE's interpretation, namely that the Commission merely is authorized to amend the must carry rules to define the carriage obligations for digital signals at the time when a broadcaster converts to digital and returns its analog channel. Such a brief discussion is incompatible with the notion that Congress created a major expansion of the must carry obligation to include both analog and digital signals from the same station during the transition period.

Given the history of constitutional challenges to must carry rules, it is unreasonable for the Commission to believe that Congress would have authorized dual carriage of analog and digital signals without conducting hearings on the matter and specifically addressing the issue in the legislation and the Reports. Congress was

^{36/} *Expressio unius est exclusion alterius*. E.g., *Railway Labor Exec. Ass'n v. National Mediation Bd.*, 29 F.3d 655 (D.C. Cir. 1994).

^{37/} H.R. Rep. 217, 1997 Code, Cong. & Admin. News 198.

aware that the analog must carry rules adopted in 1992 were upheld in *Turner II*^{38/} only after Congress in 1989 embarked on what would amount to over 18,000 pages of evidence from over three years of hearings, testimony and reports.^{39/} Given this background, it is inconceivable Congress would have expanded must carry to require carriage of both analog and digital signals of the same station without additional, extensive hearings, or at the very minimum a discussion in the legislative history to attempt to support such a requirement based upon earlier congressional hearings. On the contrary, notwithstanding the constitutional implications, Congress never mentioned the possibility of interpreting the statute to require cable operators to carry both the analog and digital signals in either of the statutory provisions relied upon by the Commission or their legislative history.

GTE's reading of the statute is based upon its plain and unambiguous language, is consistent with a reading of the statute as a whole, including the non-duplication and primary signal provisions, and would not raise Constitutional doubts. A more expansive reading of the statute would be inconsistent with its plain language and would be

^{38/} *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.C. Cir. 1995) *aff'd* 117 S. Ct. 1174 (1997) ("*Turner II*").

^{39/} The Senate Committee on Commerce Science and Transportation ("the Committee") began its examination of the cable television industry with three hearings in June 1989 on *Media Ownership: Diversity and Concentration*. This was followed by two hearings in October *Commercial Time on Children's Cable TV and Must carry*. On November 16 and 17, 1989, the Committee held two hearings on *Oversight of Cable TV* (and the 1984 Act). In early 1990, a hearing was held on the Commission's reinstatement of the "syndicated exclusivity" rule. The Committee held two hearings in March and April 1990, on S.1880 and the Committee Staff Draft Substitute. A hearing was held on March 14, 1991, on S.12.

violative of the basic principles of statutory construction, including the doctrine of Constitutional doubt.^{40/}

IV. OPTIONS 1-6 WOULD INFRINGE UPON GTE'S FIRST AMENDMENT RIGHTS.

The Commission's broad interpretation of the statute raises serious constitutional concerns if it intends to adopt any of the first six digital must carry proposals in the *NPRM*. In order to justify overriding GTE's First Amendment rights as a cablecaster to decide what signals it chooses to carry based upon free market demand, constitutional analysis requires the Commission to show its regulations advance important governmental interests unrelated to the suppression of free speech and do not burden substantially more speech than necessary to further those interests.^{41/} As set-forth below, options one through six proposed in the *NPRM* would violate GTE's First Amendment rights since digital carriage does not fit within the *Turner II* rationale and fails to pass constitutional muster under *Century*.

^{40/} *E.g., Almendez-Torres v. U.S.*, 118 S. Ct. at 1227-28; *Cable Holdings of Georgia v. McNeil Real Estate*, 953 F.2d at 604.

^{41/} *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.C. Cir. 1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.C. Cir. 1995) *aff'd*, 117 S. Ct. 1174 (1997) ("*Turner II*").

A. Dual Carriage of Analog and Digital Signals Cannot Be Justified Under *Turner*.

The Commission states that the *NPRM* is intended to further the statutory goals of (1) the successful introduction of digital television; (2) the recovery of analog spectrum by 2006; (3) the retention of the strength and competitiveness of broadcast television; and (4) the prevention of any disruptions and costs involved in the digital transition without inhibiting investment and innovation in new technologies.^{42/}

Only one of these four stated goals, the third goal of retention of local broadcasting, was used by the Commission as the justification for the analog must carry rules upheld in *Turner II*. The other three concerns of the Commission are unique to the new proposal for dual digital and analog must carry and are not supported by the prior record or *Turner* cases that upheld analog must carry.

In upholding analog must carry, the Supreme Court in *Turner II* focused on retention of local broadcasting as necessary to preserve localism and promote access to diverse programming. The *Turner II* Court balanced the goal of preserving localism and diverse programming against the burden on cable operator's First Amendment rights. However, digital must carry furthers neither of those goals, and the burden on cable operators would be substantially greater.

^{42/} *NPRM* at ¶1.

1. Localism and Program Diversity Would Not Be Promoted by Digital Must Carry.

Digital broadcast channels whether used for HDTV or DTV ^{43/} may not be used to carry local programming. New networks appear to draw insufficient revenue to support local news operations.^{44/} Broadcasters likely will air programming such as major hit movies, pay-per-view, and major sports events; in essence the most lucrative programming available. Those programs only serve to further a broadcaster's financial interests by creating new outlets for advertising revenue. As is evident in *Turner II*, must carry was not upheld to further the financial interests of broadcasters, but to foster the dissemination of local programming for those who do not or cannot subscribe to cable television service.

In addition to not preserving local broadcasting, digital must carry will not increase access to a diversity of programming. Beginning, April 1, 2003, broadcasters must air 50 percent simulcast programming on both channels, and two years later, on April 1, 2005 broadcasters are subject to a 100 percent simulcast requirement. Therefore, the only advantage for the few cable subscribers which may have digital capability will be to view identical programming on two broadcast stations. Those cable subscribers plus the subscribers who are not interested in digital, can always view all of

^{43/} Digital Television ("DTV") or Advanced Television is the utilization of a 6 MHz broadcast channel for HDTV or, through means of compression, more than one programming service.

^{44/} For example, the new "PAX Net," appears not to carry local news programs. This may well be the model for economical launch of new digital services.

the local programming on the analog channel. Consumers will not benefit from a grant of two channels to each local broadcaster on a cable system to air identical programming.

The lack of public benefit of such duplicative programming is recognized in the Commission's nonduplication exemption.^{45/} Congress' intention was to "preserve the cable operator's discretion while ensuring access by the public to diverse local signals . . ."^{46/} Substantial duplication is defined in terms of programming, not in terms of the technology used to transmit the broadcast signal. Congress has not authorized the Commission to alter the definition, thus, carriage of analog and digital broadcast signals simulcasting 50 percent or more programming clearly violates the exemption.

GTE believes that the justification for carriage of dual channels is even more troubling given the second channel will be added at the expense of unique programming currently offered on a cable system. Cable operators currently offer a rich selection of new speciality and niche programming such as The Animal Planet and The History Channel which offer award winning programming. Cable programmers not only offer quality programming for local audiences worldwide, but can (and do) dedicate entire cable channels to selected demographics. Cable also now offers cable only local

^{45/} 47 U.S.C. §534(b)(5). Substantial duplication is defined as simultaneously broadcasting identical programming for more than 50 percent of the broadcast week. In the matter of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, *Report and Order*, 8 FCC Rcd 2965, 2987 (¶60) (1993).

^{46/} H.R. Rep. No. 623, 102 Cong., 2nd Sess. 94 (1992).

news channels and as a result, consumers no longer are solely reliant on local broadcasters for local news. The Commission is familiar with News Channel 8 in Washington, D.C. In addition, in the Tampa Bay area served by GTE two very new local and regional news services have begun operations. These launches have been funded by a cable operator in one case (Time Warner) and by a startup company (Florida News Channel) in the other case. Consequently, the preservation of local broadcasting is no longer an irrefutable governmental interest. Dual cable carriage will deprive consumers of speciality cable programming and cable only news programming that will most likely be dropped to make room for a broadcasters' digital channels. Further, due to the congressionally mandated simulcast requirements, consumers will eventually gain no additional programming choices, and diversity will be substantially impaired, not increased.

2. The Burden of Digital Must Carry Would Be Greater Than Approved in *Turner*.

In *Turner II*, the Court struck a balancing test between the benefits of localism and programming choice (shown not to be present here in preceding subsections 1 and 2), and the burden imposed upon cable operators' First Amendment rights to choose their cablecasting content:

Because the burden imposed by must carry is congruent to the benefits it affords, we conclude must carry is narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable.^{47/}

^{47/} *Turner II*, 117 S. Ct. at 1199.

Here, the additional burdens of carriage of a second broadcast station significantly outweigh any potential benefits to cable and non-cable subscribers alike. The Commission's first six proposals for transitional digital must carry do not pass intermediate scrutiny under *Turner II*.

Contrary to the evidence contained in the congressional record in *Turner II*, which concluded must carry would only modestly burden cable systems,^{48/} the burdens of additional must carry requirements prior to the end of 2006 would be significant. Although, the Court concluded that the evidence taken as a whole implied a modest burden, it did not uphold a one-third capacity limit *per se*. The Court merely concluded that the information collected in the congressional record on balance showed a modest burden on cable television operators: a large majority of such operators had unused channel capacity to devote to must carry,^{49/} they did not have to drop programming to pick up the broadcast stations since most were being carried, and would continue to be carried in the absence of a Federal mandate.

However, unlike the situation in *Turner II*, no digital broadcast channels are now being carried and any digital broadcast channel that receives must carry status would mean the addition of a new channel, inevitably resulting in a much greater impact than in *Turner II* where the Court found most analog channels were already being carried. Also cable operators are now encumbered with more analog broadcasting stations,

^{48/} *Id* at 1198.

^{49/} *Id*.